she admits her husband made many attempts at reconciliation but would not go back to her husband because she did not like him any more. Later on she said her husband had been cruel.

On the other hand, the husband testified he wants her and still loves her. He denied his attempts at reconciliation were prompted by the wife's application for maintenance. He admitted he would not give her money if she does not return to live with him.

On all this evidence, is an appellate tribunal, not having the benefit of seeing and hearing the parties, in a position to decide whether there has been a culpable omission on the part of the husband to provide reasonable maintenance for his wife, where the magistrate has made no findings at all? In my judgment, it is not in a position to do so.

For all these reasons, in my judgment the appeal should be allowed and the matter be remitted to another magistrate to be re-tried and I make an order accordingly.

However unsatisfactory the position now is, I hope that the parties will now re-consider the attitudes they have adopted in the past in the light of the fact that they must now recognise that their differences have arisen, not from personal incompatibility, but out of the desire on the part of the husband to be a good son and on the part of the wife to be a good daughter. I hope too that they will now realise that their real responsibility lies, as spouses, in one being a good husband and in the other being a good wife and that the carrying out of this fundamental responsibility is not incompatible with being also a good son and a good daughter. Perhaps, the real solution may be, and they have the means and the ability to do so, in their making a matrimonial home for themselves apart from their respective parents.

Retrial ordered.

Solicitors: *Lee & Lee; S. K. Lee.*

ABDUL SHUKOR v. HOOD MOHAMED

[O.C.J. (Ambrose J.) February 22, 1968]
[Singapore — Suit No. 1949 of 1964]

Contract — Illegal contract — Money had and received — Remittance to India in black market rate — Indian Foreign Exchange Act, 1947 — Action for money had and received — When maintainable.

Conflict of laws — Contract — Enforceability of — Illegal by lex loci solutionis.

This was an action for money had and received by the defendant to the use of the plaintiff. The plaintiff, alleged that he gave the defendant $61,000 on January 8, 1960 shortly before he left for India on the defendant's promise to send the whole of the money to him in India. The plaintiff received only $21,466.56 from the defendant. He claimed the balance, namely, $39,533.44. The allegations in the defence were that on or about the beginning of January, 1960, the plaintiff handed $25,000 to the defendant, and later $6,000, upon a verbal agreement that the defendant should remit the said sums to India illegally in a manner contrary to Indian exchange control laws. The sum of $28,500 was remitted by the defendant to the plaintiff in India. A further sum of $1,500 was paid by the defendant to one *M* at the request of or with the sanction of the plaintiff. Finally a further sum of $1,000 was retained by the defendant with the knowledge of the plaintiff, in repayment of a debt due from the plaintiff to the defendant. It was agreed between the parties that if the defendant should make a profit on the illegal transaction, the defendant should be entitled to retain it. The defendant made a profit of $4,135.

The court had to consider the following questions: (1) whether the plaintiff handed the defendant $61,000 on January 8, 1960; (2) did the plaintiff ask the defendant to send the money, which he handed to the defendant, to him in India at the black market rate of exchange?; (3) how much of the money received by the defendant from the plaintiff remained in the defendant's hand?; (4) whether the contract entered into by the plaintiff and the defendant was illegal by the law of India; (5) whether the contract being illegal by the law of India was enforceable in Singapore, and (6) whether an action could be maintained by the plaintiff for money had and received by the defendant under an illegal contract.

Held: (1) the sum of money handed by the plaintiff to the defendant on January 8, 1960, was only $31,000;

(2) the plaintiff asked the defendant to send the money, which he handed to the defendant, to the plaintiff in India at the black market rate of exchange;

(3) the balance remaining in the hands of the defendants was $7,941.41;

(4) the contract entered into by the plaintiff and the defendant was contrary to section 4(2) of the Indian Foreign Exchange Regulations Act, 1947;

(5) in the present case the *lex loci solutionis* was the law of India as the contract was to be performed in India. The contract was not enforceable in Singapore as it was illegal by the *lex loci solutionis;*

(6) the parties entered into, and the money which the plaintiff sought to recover was paid in pursuance of an illegal contract. An action for money had and received lay for the recovery of money paid in pursuance of an illegal contract, provided it was brought while the contract was still executory or before the illegal purpose had been substantially performed. In the present case the illegal purpose had been substantially performed before the action for money had and received was brought. It was brought too late for the plaintiff to have the assistance of the court. There was a further reason why the court could not assist the plaintiff because the weight of judicial authority has been strongly in favour of the theory that the action for money had and received depends on an imputed promise to pay.

Cases referred to:—

(1) *Ralli Brothers* v. *Compania Naviera Sota Y Aznar* [1920] 2 K.B. 287.

(2) *Mistry Amar Singh* v. *Kulubya* [1941] A.C. 142.

(3) *Sajan Singh* v. *Sardara Ali* [1960] M.L.J. 52, P.C.

(4) *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* [1945] K.B. 65.

(5) *Sinclair* v. *Brougham* [1914] A.C. 398.

(6) *Boissevain* v. *Weil* [1950] A.C. 327.

CIVIL SUIT.

J. B. Jeyaretnam for the plaintiff.

H. E. Cashin for the defendant.

Cur. Adv. Vult.

Ambrose J.: This was an action for money had and received by the defendant to the use of the plaintiff. The allegations in the amended statement of claim were these. The plaintiff gave the defendant $61,000 on the 8th January, 1960, shortly before the plaintiff left for India on the defendant's promise to send the whole of the money to the plaintiff in India. The plaintiff received only $21,466.56 from the defendant. He claimed the balance, namely, $39,533.44.

The allegations in the defence as finally amended were these. In or about the beginning of January, 1960, the plaintiff handed $25,000 to the defendant, and later $6,000, upon a verbal agreement that the defendant should remit the said sums to India illegally in a manner contrary to the exchange control laws of the Republic of India. The sum of $28,500 was remitted by the defendant to the plaintiff in India. A further sum of $1,500 was paid by the defendant to one Mr. Menon at the request of or with the sanction of the plaintiff. Finally a further sum of $1,000 was retained by the defendant with the knowledge of the plaintiff, in repayment of a debt due from the plaintiff to the defendant. It was agreed between the plaintiff and the defendant that if the defendant should make a profit on the illegal transaction, the defendant should be entitled to retain it. The defendant made a profit of $4,135. The agreement being illegal by the laws of India, a friendly power, no action could be maintained thereon.

The first question I considered was whether the plaintiff handed the defendant $61,000 on the 8th January, 1960. The plaintiff's evidence was briefly this. He was formerly employed as manager and cashier of Oriental Supply Co. at 324 Telok Ayer Street, Singapore. That business belonged to his uncle, Haniffa. On the 8th January, 1960, at about 11 a.m. he handed the defendant $31,000 in front of Whiteaways' Building at Battery Road, Singapore. On the same day at about 9.30 p.m. he went with one Mohamed Sultan to the defendant's house at No. 152 Jalan Eunos, Singapore, and while Mohamed Sultan remained outside on the road, he went into the front room of the defendant's house and handed the defendant another $30,000. On the same day he left for India by plane at about 10 p.m.

The plaintiff's story as to how he came to have $61,000 was as follows. His father had done business in Singapore from the Japanese occupation and gave him $35,000 before his death. He kept the money in cash at 324 Telok Ayer Street, Singapore, and also at various other places during the Japanese occupation. After his father's death in 1945 or 1946 he kept the $35,000 in Haniffa's safe in the Hongkong and Shanghai Bank, Singapore. He went to India in 1947, leaving the $35,000 in the safe in the bank. He did not invest the $35,000 because he did not trust anyone. Haniffa gave him $25,000 for managing the business of Oriental Supply Co. from 1945 to 1959. He did not receive any salary but he had free board and lodging.

It seemed to me utterly incredible that the manager of a business would keep $35,000 lying idle in a safe in a bank for 13 or 14 years instead of earning interest on the money by depositing it in a fixed deposit account. Furthermore, I accepted the evidence of A.B. Pintu, a clerk employed in the Hongkong and Shanghai Bank, who was called by the defendant. His evidence was that the bank started saving deposit boxes only in 1948; that the plaintiff never had a safe deposit box at the bank; that Oriental Supply Co. never had a safe deposit box with the bank; and that K.P. Mohamed Haniffa started a safe deposit box with the bank only in 1957. It seemed quite clear to me that the plaintiff told a lie when he said he kept a sum of $35,000 given to him by his father from 1945 or 1946 to 1960 in Haniffa's safe at the Hongkong and Shanghai Bank. I rejected the plaintiff's story that he had on the 8th January, 1960, in Haniffa's safe at the bank, a sum of $35,000 which his father had given him before his death.

As regards the $25,000, alleged to have been given to him by Haniffa, the plaintiff said Haniffa paid him from 1957 to 1959 a sum of $5,000 on one occasion, a sum of $6,000 on another occasion, and various sums on three other occasions amounting to $14,000. Later the plaintiff changed his story and said he was given the $25,000 in 1959 but not in 1957 or 1958. He said it was possible that he spent seven years during the period 1945 to 1959 in India.

According to Majid, son of Habib Mohamed, a clerk employed by Oriental Supply Co., the proprietor, Haniffa, told him on the 9th January, 1960, that some money was missing from the safe in the bank and that the plaintiff was not to be seen and asked him if he knew where the plaintiff was.

I inferred from this that the plaintiff, who was Haniffa's manager and cashier, and had a key to the safe in the bank, had stolen some money belonging to Haniffa from the safe. I disbelieved the plaintiff's story that Haniffa had given him $25,000 for 14 years' service.

I disbelieved Majid's story that on the 12th or 13th January, 1960, the defendant came to the premises of Oriental Supply Co. and said to him in the presence of Haniffa that the plaintiff could not be seen and a sum of $61,000 was missing from the bank. This struck me as

obviously false evidence. It seemed to me that even if the plaintiff had handed the defendant $61,000 he would never have told Majid in the presence of Haniffa that a sum of $61,000 was missing from the bank.

To support his allegation that he handed $61,000 to the defendant, the plaintiff relied on certain letters alleged to have been written by him to the defendant. [*After analysing the correspondence between the plaintiff and the defendant, the learned judge continued*:]

Counsel for the defendant submitted that Ex. P.9 was a fabrication and that if Ex. P.9 could have been fabricated, then Exs. P.2, P.3, and P.4 could also have been fabricated.

I accepted this submission. I came to the conclusion that Exs. P.2, P.3, P.4, and P.9 were all fabrications.

The defendant's evidence was that on the 8th January, 1960, at 11 a.m. the plaintiff gave him a sum of $25,000 and at 8 p.m. on the same day a further sum of $6,000, making a total of $31,000. I found that the sum of money handed by the plaintiff to the defendant on the 8th January, 1960, was only $31,000.

The second question I had to consider was this: did the plaintiff ask the defendant to send the money, which he handed to the defendant, to the plaintiff in India at the black market rate of exchange? The defendant's evidence was as follows. In January, 1960, the official rate of exchange was $65 for 100 rupees and the black market rate of exchange was $54 or $55 for 100 rupees. On the 8th January, 1960, about 9 a.m. the defendant was in Haniffa's office. The plaintiff asked the defendant to meet him in the General Post Office at 11 a.m. At 11 a.m. they met in the General Post Office in the rear portion of the building where there are private letter-boxes. The plaintiff said to the defendant, "Here is $25,000. Send this through black market. The rest Mr. Menon knows." The plaintiff handed the defendant $6,000 at 8 p.m. the same day in the grounds of the Alkaff Mosque in Kampong Melayu, and told him to retain $1,000 in satisfaction of two loans of $400 and $600 previously made by the defendant to the plaintiff and to send $5,000 to the plaintiff in India through the black market.

The plaintiff's evidence was as follows. The money he gave the defendant on the 8th January, 1960, was given on the defendant's promise to send the whole of the money to the plaintiff in India. He was not aware of the Exchange Control laws of India. There was no discussion as to how the money was to be sent to the plaintiff in India. There was no discussion about his getting more than the amount due at the official rate of exchange.

The plaintiff stated that he received only 33,300 rupees from the defendant. In his original statement of claim he treated this sum as equivalent to $16,500. He said he treated $100 as equal to 200 rupees roughly, because that was "the rate in practice", though he conceded that that was not the official rate. From this I drew the inference that he expected the defendant to send the money handed by him to the defendant at "the rate in practice" and not at the official rate of exchange. The instruction he gave his solicitor to demand the balance of $44,500 from the defendant supported my view.

Furthermore, it appeared from the bundle of agreed correspondence between the plaintiff and the defendant that they used a private code in referring to money sent by the defendant to the plaintiff in India. For example, in Ex. A.B.2, a letter dated the 26th July, 1960, written by the defendant to the plaintiff in India, the defendant wrote:—

> "I am glad you have received my Document Ref. AJ/JJJ. I shall send another Document of K/fff today or tomorrow."

With regard to this the plaintiff said that when he received the letter he understood the expression "Document Reference AJ/JJJ" to refer to the 10,000 rupees which he had received: and he understood the expression "Document K/fff" to refer to a sum of 5,000 rupees. I took the view that the use of a private code indicated the need for secrecy felt by both the plaintiff and the defendant, and that the only possible explanation for the use of the private code was that money was being sent to the plaintiff in India through black market channels to the knowledge of the plaintiff.

Quite apart from the above evidence, it seemed to me much more probable than not that the reason why the plaintiff had not sent the money to India by a bank draft was that he wished to take advantage of "the rate in practice". For the above reasons I came to the conclusion that the plaintiff asked the defendant to send the money, which he handed to the defendant, to the plaintiff in India at the black market rate of exchange.

The third question I had to consider was this: how much of the $31,000 received by the defendant from the plaintiff remained in the defendant's hands? The plaintiff stated he received only 33,300 rupees from the defendant. The defendant stated he sent 44,300 rupees to the plaintiff. In my view, the defendant, like the plaintiff, was dishonest. That was the impression I formed of the defendant as I went through the agreed bundle of correspondence. That was the impression I formed when I read paragraph 6 of the finally amended defence which reads:—

> "It was agreed between the plaintiff and the defendant that if the defendant should make a profit on the illegal transactions referred to in paragraph 3 hereof, then the defendant should be entitled to retain any such profit made".

Paragraph 6 struck me as incredible. It was contradicted by the defendant's own evidence, which was that the profit to be made by sending the money by black market was to be divided equally between the plaintiff and the defendant. In my opinion, the only safe course was to accept what the plaintiff said regarding the amount received by him. I found, therefore, that the defendant sent the plaintiff only 33,000 rupees. This sum, according to the official rate of exchange, amounts to $21,466.56 cts. The amount of the plaintiff's money left in the hands of the defendant was therefore $31,000 less $21,466.56 cts., that is $9,533.44 cts. I found that from this amount the sum of $1,000 had to be deducted in respect of two sums of $600 and $400 previously lent by the defendant to the plaintiff: see Ex. P.1. I found also that a further sum of $592 had to be deducted: this was the cost of certain things given by the defendant to the plaintiff: see Ex. P.1. I found that the balance in the hands of the defendant was thus $7,941.44 cts.

The fourth question I had to consider was whether the contract entered into by the plaintiff and the defendant was illegal by the law of India. Section 4(2) of the Foreign Exchange Regulations Act, 1947, of India provides as follows:—

> "Except with the previous general or special permission of the Reserve Bank, no person whether an authorised dealer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank".

Section 1(2) of the Act provides that the Act applies to all citizens of India outside India. I found on the evidence before me that in 1960 the plaintiff was a citizen of India and that, therefore, section 4(2) of the Act applied to him. I found that the transaction entered into by the plaintiff with the defendant was for the conversion of Singapore dollars into Indian currency at the black market rate of exchange and not at the official or authorised rate of exchange. I found that the contract entered into by the plaintiff and the defendant was contrary to section 4(2) of the Act. I found further that both the plaintiff and the defendant knew that the contract was illegal by the law of India.

The fifth question I considered was whether the contract being illegal by the law of India was enforceable in Singapore. The English courts will not enforce a contract which is illegal according to the *lex loci solutionis*: *Ralli Brothers* v. *Compania Naviera Sota Y Aznar.*[1] In the present case the *lex loci solutionis* was the law of India as the contract was to be performed in India. In my opinion the contract was not enforceable in Singapore as it was illegal by the *lex loci solutionis*. Here it must be stated that foreign exchange control regulations are not refused recognition by the English courts on the ground that they are in the nature of foreign revenue laws: they serve, in fact, not the purpose of enlarging the revenue of a foreign state but the different purpose of preserving the international value of the currency: *Chitty* on Contracts, 22nd edition, Vol. I, para. 1702. It must be added here that a contractual obligation may be invalidated or discharged by exchange control legislation if it is part of the law of the place of performance: *Dicey's* Conflict of Laws, 7th edition, page 919.

The last question I considered was whether an action could be maintained by the plaintiff for money had and received by the defendant to the use of the plaintiff for money paid by the plaintiff to the defendant under an illegal contract. It was submitted by counsel for the plaintiff that a plaintiff may enforce the recovery of money, chattels or land transferred to the defendant if he can prove a course of action entirely independent of the illegal contract entered into by the parties He cited the case of *Mistry Amar Singh* v. *Kulubya.*[2] There the facts were these. By virtue of certain agreements made between the parties, the defendant took possession of land in Uganda belonging to the plaintiff, who was the registered owner. The agreements were illegal since they contravened a statute. The plaintiff admitted that he had been a party to the illegality, but nevertheless he sued for the recovery of the land. His claim to possession was based upon the independent ground of his registered ownership. He was not obliged to found his claim on the illegal agreements. Nor was he obliged to plead or to depend on them. The Privy Council held that he was entitled to possession.

I accepted the proposition submitted by counsel for the plaintiff. It was applied in the two other cases cited by him: *Sajan Singh* v. *Sardara Ali;*[3] *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.*[4] But in my view, the cause of action framed by the plaintiff was not entirely independent of the illegal contract entered into by the parties. It is true that in the statement of claim the plaintiff avoided all reference to the illegal contract. But the illegality was raised by the defendant in his pleading. And I found that the parties entered into an illegal contract, and that the money which the plaintiff sought to recover was paid in pursuance of an illegal contract. Here it is to be borne in mind that an action for money had and received lies for the recovery of money paid in pursuance of an illegal contract, provided it is brought while the contract is still executory or before the illegal purpose has been substantially performed. In the present case the illegal purpose had been substantially performed before the action for money had and received was brought. In my judgment, it was brought too late for the plaintiff to have the assistance of the court.

There was a further reason why the court could not assist the plaintiff. In my opinion, the weight of judicial authority has been strongly in favour of the theory that the action for money had and received depends on an imputed promise to pay. Lord Summer said in *Sinclair* v. *Brougham*,[5] at page 452:—

"The law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which if made *de facto*, it would inexorably avoid."

This *dictum* was approved by the House of Lords in *Boissevain* v. *Weil*.[6] The *dictum* must, in my view, be applied in the present case.

If, on the other hand, the action for money had and received is based on the theory that a person who has been unjustly enriched at the expense of another is required to make restitution to that other, then it has to be borne in mind that the courts in England have found it necessary to impose limitations on claims to restitution, and that in England these limitations are imposed by the test of the implied contract. As was said by Lord Radcliffe in *Boissevain* v. *Weil, supra,* at p. 341 with regard to Lord Sumner's *dictum* which is set out above:—

"His principle is surely right whether the action for money had and received does or does not depend on an imputed promise to pay".

So Lord Sumner's *dictum* has to be applied in the present case even if the action for money had and received is based on the principle of unjust enrichment.

It was for the above reasons that I dismissed the plaintiff's claim and ordered the plaintiff to pay the defendant's costs.

Claim dismissed.

Solicitors: *Donaldson & Burkinshaw; Murphy & Dunbar.*

HONG LEONG CO. LTD. v. PEARLSON ENTERPRISES LTD. (No. 2)

[O.C.J. (Ambrose J.) February 29, 1968]
[Singapore — Suit No. 317 of 1965]

Contract — Breach of — Inconvenience — Nominal damages.

Practice and Procedure — Costs — Plaintiff causing inconvenience and delay — Plaintiff to pay costs.

This case was only concerned with the counterclaim which was ordered to be retried by the Federal Court on August 7, 1967 (see [1968] 1 M.L.J. 24). On the retrial the court merely had to decide on the quantum of damages under the first two items of the counterclaim (the other two items having been abandoned).

Held: (1) as to the first item of the counterclaim (namely the difference between the contract price and the lowest possible market price for 281,004 bricks of No. 3 commercial quality) the defendants were not entitled to any damages as the offer made by the plaintiffs on January 8, 1965 was a reasonable one and the defendants should have mitigated their loss by accepting the plaintiffs' offer and no loss would have been suffered by the defendants if they had accepted it;

(2) the second item of the counterclaim for $11,868 (being wages paid to 18 workers for 69 days at $172 per day) could have been avoided as it was the practice in the building trade for bricklayers and carriers to be sent away without pay if there was no work for them to do because of a lack of bricks;

(3) the defendants were, however, entitled to recover nominal damages for breach of contract. The sum of $10 was awarded as nominal damages;

(4) as the plaintiffs by their breach of contract caused the defendants considerable inconvenience and unreasonably delayed the construction of the block of flats, they should pay the defendants the costs of the retrial and the original trial of the counterclaim to be taxed on the lower scale.

CIVIL SUIT.

K. S. Chung for the plaintiffs.

K. A. O'Conner for the defendants.

Ambrose J.: In this case I was only concerned with the counterclaim, which was ordered by the Federal Court on the 7th August, 1967, to be retried.

The Federal Court decided that the plaintiffs were guilty of a breach of the contract of the 18th June, 1964, by reason of their insistence, in their letter of the 15th December, 1964, on immediate payment on delivery at $85 per 1,000 bricks for all bricks to be delivered to the defendants in the future; that in all the circumstances the defendants were entitled to treat the breach as a complete repudiation of the contract so as to discharge the defendants from their obligations under the contract; and that the defendants elected to do so by their letter of the 19th December, 1964.

I did not, therefore, have to decide the question of the plaintiffs' liability and had merely to decide the quantum of damages.

At the commencement of the retrial the defendants abandoned the last two items of their counterclaim and proceeded only with the first two items.

The first item of the counterclaim was the difference between the contract price and the lowest possible market price for 281,000 bricks of No. 3 commercial quality. The contract price was $79 per 1,000 bricks. I found that the lowest possible market price was $79 per 1,000 bricks, which was the price offered by the plaintiffs in their letter of the 8th January, 1965; and that at that date the defendants had not entered into any contract with any other supplier. I found that the defendants did not conclude a contract with Bin Keow Brick Works Ltd. until the 29th January, 1965. It seemed to me that the offer made by the plaintiffs on the 8th January, 1965, was a reasonable one; that the defendants should have mitigated their loss by accepting the plaintiffs' offer; and that no loss would have been suffered by the defendants if